

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District District of Puerto Rico
Name of Movant Epifanio Matos Luchi	Prisoner No. #31216-069	Case No. 3:07-cr-00208-JAF
Place of Confinement FCI Fort Dix, P.O. Box 38, Fort Dix, N.J. 08640.		

UNITED STATES OF AMERICA

v. EPIFANIO MATOS LUCHI

(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack U.S. District Court for the District of Puerto Rico, 150 Carlos Chardon Ave., San Juan, P.R. 00918.
2. Date of judgment of conviction Sept. 9, 2008
3. Length of sentence 235 months (19 yrs. & 7 months).
4. Nature of offense involved (all counts) Count One; Conspiracy to possess with intent to distribute five kilograms or more of cocaine, on board a vessel subject to the jurisdiction of the U.S., in violation of Title 46 U.S.C. §§70502(c)(1)(A), 70503(a)(1), 70504(b)(1), & 70506(b). Count Two; Aiding and Abetting to possess with intent to distribute 5 kilograms or more of cocaine, on board a vessel subject to the jurisdiction of the U.S., in violation of Title 46 U.S.C. §§ 70502(c)(1)(A), 70503(a)(1), 70504(b)(1) & Title 18 U.S.C. §2.

5. What was your plea? (Check one)

- (a) Not guilty
- (b) Guilty
- (c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

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6. If you pleaded not guilty, what kind of trial did you have? (Check one)

- (a) Jury
- (b) Judge only

7. Did you testify at the trial?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court U.S. Court of Appeals for the First Circuit.

(b) Result Conviction Affirmed.

(c) Date of result U.S. v. Matos, 627 F.3d 1 (1st Cir., Dec. 1, 2010).

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No

(5) Result _____

(6) Date of Result _____

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No

(2) Second petition, etc. Yes No

(3) Third petition, etc. Yes No

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: WHETHER MOVANT'S COUNSEL WAS INEFFECTIVE FOR NOT PLEADINGFOR A CONTINUANCE IN ORDER TO PRODUCE A SUBPOENAED WITNESS?

Supporting FACTS (tell your story briefly without citing cases or law): Because this Court granted a subpoena of Dominican Republic's official Carmelo Matos Rodriguez. During the trial proceeding the above mentioned subpoenaed witness was unavailable to testify, due to an error by the defense, in the information needed for traveling purposes. The First Circuit held the burden to produce the witness lied on the defense, since no continuance was requested. In support, see Memorandum of Law attached hereto.

B. Ground two: WHETHER MOVANT'S COUNSEL WAS INEFFECTIVE FOR NOT PLEADING FOR A SUBSTANTIVE DOWNWARD DEPARTURE TO THE COURT WHEN THE SENTENCING RECORD DEMONSTRATES MERIT?

Supporting FACTS (tell your story briefly without citing cases or law): As the First Circuit held this Court to understand its authority under Booker. During the Sentencing Hearing, this Court held, because no argument has been submitted for considering a substantive departure, said tailoring of the procedural sentence was not available. However, Movant submits that counsel could requested said departure, by arguing how the 235 sentence presented a disparity between the defendants, since this Court determined that the other defendants lied on the stand, yet all received the same sentence.

C. Ground three: (see Memorandum of Law, supra); WHETHER MOVANT'S APPELLATECOUNSEL WAS INEFFECTIVE FOR NOT HAVING PURSUED FURTHER REVIEW OF THE STATUTORY INTERPRETATION ISSUE?

Supporting FACTS (tell your story briefly without citing cases or law): Because the First Circuit held the word "aboard" to mean alongside of, for purposes of determining whether a boat, on high seas, is a vessel without nationality", pursuant to Title 46 U.S.C. §70502(d)(1)(B), even though the Court concedes there to be two meanings, and because an informal consent to

transfer the Movant from the Dominican cutter to the U.S. authorities the First Circuit held, is an open question. Movant's counsel shoul have competently pursued further review of the debatable matter. See Memorandum

D. Of Law. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: The previously mentioned grounds were not presented due to counsel's ineffective demeanor in not reasonably exercising his Sixth Amendment duty to effective assistance of counsel. Had counsel moved for a continuance at trial, due to the fact that a subpoenaed witness was having difficulties with traveling arrangements; Had counsel, at Sentencing, moved the Court to consider the Title 18 USC S3553(a) factors for a non-guideline sentence, when the established record indicates the Court was willing to depart from the stipulated guideline; Had Appellate Counsel continued to pursue review of the case on a rehearing en banc or writ of certiorari, based on the expressed reasons there is a reasonable probability that the outcome of the proceeding would have been different.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack? _____
 Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Carlos A. Vazquez-Alvarez, Esq., P.O. Box 364431, San Juan P.R. 00936-4431, (787)764-6752; carlosvazquezlaw@yahoo.com.

(b) At arraignment and plea Joseph C. Laws, AFPD, Patio Gallery Bldg., 241 Franklin D. Roosevelt Ave., Hato Rey, P.R. 00918-2441, (787)281-4927; joseph_laws@fd.org

(c) At trial Ricardo Rafael Morel, Esq., PHV, 6 Soulice Place, New Rochelle, N.Y. 10804, (914)471-5884; drmorel@optonline.com.

(d) At sentencing Ricardo Rafael Morel, supra.

(e) On appeal Ricardo Rafael Morel, ante.

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

11-30-11
(date)

Epifanio Matos L
Signature of Movant

IN THE UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF PUERTO RICO

EPIFANIO MATOS LUCHI,
Movant, :
v. : Case No. _____
UNITED STATES OF AMERICA, : (07-cr-00208-JAF)
Respondent. :
_____ X

MEMORANDUM OF LAW
IN SUPPORT OF §2255 MOTION
TO VACATE, SET ASIDE, OR CORRECT CONVICTION/SENTENCE

RECEIVED AND FILED
U.S. DISTRICT COURT
CLERK'S OFFICE
DECEMBER 20, 2011
PM 2:57

COMES NOW, the Movant, Epifanio Matos Luchi, propria persona in *sui juris*, in a timely fashion moves the presiding Court, pursuant to Title 28 U.S.C. §2255, for constitutional violations, to review whether Movant's counsel, Ricardo Rafael Morel (Morel), provided ineffective assistance of counsel when failing to plead for a continuance at trial, in order to secure the available testimony of a subpoenaed witness; Whether counsel Morel's performance at the Sentencing proceeding was deficient by not moving the presiding Court to consider the Title 18 U.S.C. §3553(a) factors for a non guideline sentence, when this Court indicated that it was willing to consider the above cited factors; And whether counsel Morel was ineffective for not pursuing further appellate review of the case, under the charging statute's legislative intent interpretation, when the issue is debatable on its' merits.

Because the above mentioned grounds are before this Court under an ineffective assistance of counsel claim, pursuant to the Sixth

Amendment to the U.S. Constitution, of which counsel Morel's actions and omissions have prejudiced the Movant to a fair process of law, pursuant to the Fifth Amendment to the U.S. Constitution's Due Process of Law Clause. The Movant respectfully submits the instant §2255 pleading with the present Memorandum of Law in support of the Grounds and argument brought forth to the presiding Court for a collateral review.

STATEMENT OF THE CASE

Substantial¹:

a. Nature of the Case

The case before this Court stems from a drug trafficking offense conduct where Movant and other conspirators were found guilty, by a Jury Trial, for Conspiracy to possess cocaine with intent to distribute on board a vessel subject to the jurisdiction of the U.S., see Title 46 U.S.C. §§70502(c)(1)(A), 70503(a)(1), 70504(b)(1), & 70506(b), [Doc. No. 14].

The facts revealed that on May, 2007 U.S. Coast Guard officers, stationed on a British ship (HMS Ocean), deployed a helicopter for the investigation of a low-flying aircraft within the patrolled waters, see U.S. v. Matos-Luchi 627 F.3d 1 (1st Cir. 2010). Accordingly, the U.S. Coast Guard personnel observed the above mentioned aircraft drop several bale-shaped packages on

[1] Being the majority of the procedural information is provided for in the §2255 motion/form, the Movant, in order to avoid unnecessary duplication, will only submit in the instant Memorandum of Law In Support the substantial facts of the case, in this matter. Additionally, Movant will refer to the established record on the docket entries, as [Doc. No.].

the water, thirty-five miles from the coast of the Dominican Republic.

Consequently, a small boat, propelled by an outboard motor, known as a "yola"², approached the drop site and its crew began to retrieve the foregoing packages. Upon suspecting illegal drug trafficking on high seas, the officers descended the helicopter. Upon descending, the "yola" crew jettisoned the mentioned bales and fled the scene.

A U.S. Customs & Border airplane followed the "yola" as it proceeded north towards the Dominican Republic. The "yola", seemingly, experienced engine problems and stopped at a few miles off the Dominican coast. At the request of U.S. Customs, a Dominican Coast Guard cutter was deployed in order to retrieve the "yola" and its crew. The three man crew were taken on board the Dominican cutter, while the "yola" was tied to the cutter's stern.

Several hours later, after the above mentioned "yola" crew was seized by the Dominican authorities, with the permission of the Dominican authorities, U.S. Coast Guard officials visited the cutter and questioned the "yola" crew.

Upon determining that the "yola" crew was subject to the jurisdiction of the U.S., the U.S. Coast Guard, on instructions from their superiors, detained the "yola" crew and transferred them to HMS Ocean, see Matos-Luchi, ante, 2-3.

2] According to both the Dominican and U.S. officials in charge of patrolling the waters, where the offense conduct occurred, "yola's" are commonly used for fishing, in the Caribbean, [Doc. No. 140, p. 144-45] & [Doc. No. 143, p. 13-14].

b. Grand Jury Minutes

Upon having been charged with the previously mentioned charges, Movant pleaded to the Court for access to the Grand Jury Minutes, see U.S. v. Matos-Luchi 529 F. Supp.2d 292 (D.P.R. 2007). The reason for pleading so is based on Movant's position that a "yola" is not a go-fast vessel, which is typically used for drug trafficking operations on high seas. This Court denied the above mentioned pleading.

c. Court's Disposition of the Trial

Upon having submitted motions to dismiss the charges for jurisdictional purposes, this Court holding that the motion, claiming in particular that there was no proof to conclude how the "yola" crew was onboard a "vessel without nationality", see 46 U.S.C. §§70502(c)(1)(A) & 70503(a)(1), was to be held in abeyance. Thus, the Movant proceeded to Jury Trial.

The Jury, consequently, finds Movant and the rest of the "yola" crew guilty as charged. At Sentencing, based on a procedural United States Sentencing Guidelines (USSG) calculation, the Movant is sentenced to a low-end 235 month term of imprisonment, in guideline level 38, due to the seized drug amount.

d. Direct Review

Pursuant to the First Circuit Court of Appeals' published opinion in U.S. v. Matos-Luchi 627 F.3d 1 (2010), upon Movant's counsel having submitted several appellate issues, the First Circuit held as to 1) Whether Movant's possession of the drugs, with intent to distribute, occurred on board a "vessel

subject to the jurisdiction of the United States", 46 U.S.C. §70503(a)(1), the Circuit held this Court to be "correct" with its determination that the "yola" is a "vessel without nationality", Matos-Luchi, ante, at 4. Likewise, the Circuit, in viewing the issue of whether the "yola" is a stateless vessel, the First Circuit held, "retrospectively", how the above mentioned vessel "had various links to the Dominican Republic", Matos-Luchi, Id. 5, specifically, since the crew members are Dominican citizens; at Trial, one of the crew members testified to the "yola" being registered; and the "yola" before having the mentioned engine difficulties, was likely heading towards the Dominican Republic, Id. . However, the Circuit Court held how because the questioned vessel merely "has associations with another state", it is not enough to limit the U.S. enforcement authorities' power, Id. . In line with the previously submitted issue, the First Circuit conceded, in its analysis, that had the word "'aboard'" in 46 U.S.C. § 70502(d)(1)(B)'s language been "given its common meaning of 'on board'", because the "questioning was aboard the Dominican cutter rather than the defendants' yola", the above mentioned case would not have arguably fit within the language of the above mentioned statute, Id. 6. But because "neither 'aboard' the yola, nor adjacent to it on the cutter, did any crew member make an affirmative claim of nationality for the vessel, nor did the yola fly a flag or carry registry papers issued by any state", Id. ; The previously mentioned is sufficient to include the "yola" as a vessel that is subject to United States' jurisdiction, Id. at 4.

Following the foregoing analysis, the First Circuit also held, as to the Dominican authorities' informal consent in permitting the U.S. authorities to transfer the Dominican "yola" crew, how said consent "may be an open question", Matos-Luchi, ante, .

2) In furtherance to the relevant grounds presented in this habeas pleading, the Circuit Court also held, as to the trial subpoena order issued at Movant's request, in order to produce at trial witness Carmelo Matos Rodriguez (Rodriguez), how because "there was insufficient time to get him the necessary documents to travel to the United States", Matos-Luchi, Id. 8, due to the fact that Rodriguez was incorrectly identified by Movant's counsel as a member of the Dominican Coast Guard, when in fact he was a member of the Dominican Direction for Drug Control, the weight of responsibility to be centered on the fact that Movant "never sought a continuance", Id. .

3) Finally, the First Circuit addressed the sentencing issue on whether this Court "failed to understand his discretion to depart downwards under Booker", Id. 9, pursuant to U.S. v. Booker 543 U.S. 220 (2005). In its holding, the Circuit Court held how there is "no indication that the judge misunderstood his authority; rather he simply thought that the [Movant] had offered no persuasive reason for a lower sentence", Id. .

Thereby, based on the submitted Grounds for constitutional violations and the available substantial facts, the argument for relief purposes, in this §2255 pleading, is as follows:

ARGUMENT

1] Ineffective Assistance of Counsel

In the U.S. Supreme Court's landmark decision in Strickland v. Washington 466 U.S. 668 (1984), the Strickland, ante, Court held where counsel's error has substantially affected the fairness of the proceeding, and the erroneous act or omission by counsel prejudiced the defense, ineffective assistance of counsel is presumed, see U.S. v. Manon 608 F.3d 126,131 (1st Cir. 2010).

In the context of Habeas petitioners, Movant must demonstrate that counsel Morel's performance, at the different stages of the proceeding, was deficient and that the deficient performance prejudiced the Movant, Samboy v. U.S. 738 F. Supp.2d 190,192 (D.Mass. 2010). As constitutional errors, in a habeas pleading, should be corrected if said errors result in actual prejudice, Brecht v. Abrahamson 507 U.S. 619,623, 637-38 (1993), the "benchmark" of an ineffective assistance of counsel claim is the fairness of the adversary proceeding, see Nix v. Whiteside 475 U.S. 157 at 175 (1986). As held in U.S. v. Cronic 466 U.S. 648, lawyers in criminal cases are "necessities, not luxuries", they are the means through which other rights of the Movant are secured, Id. at 653.

As the U.S. Constitution demands that Movant is entitled to a reasonably competent attorney, see McMann v. Richardson 397 U.S. 759,770 (1970); the core purpose of the previously mentioned counsel guarantee is to assure "assistance", when Movant is confronted with both intricacies of law and the advocacy of the public prosecutor, see Cronic, supra, 654. Thus, the presented

ineffective assistance of counsel claims should demonstrate, that had it not been for counsel Morel's errors, there is a reasonable probability that the outcome of the proceeding would have been different, see Manon, ante, Id. 131. And a reasonable probability, as previously detailed, is sufficient to undermine confidence in the proceeding, see Strickland, ante, Id. 694, for determining a fair process. In light of the aforementioned the submitted Grounds are supported by the following facts and legal interpretation:

2] Whether Movant's Counsel was Ineffective for
not Pleading for a Continuance in order to
Produce a Subpoenaed Witness?

As a trial subpoena was executed by the presiding Court to produce the witness Carmelo Matos Rodriguez, [Doc. No. 139], accordingly, due to the fact that the above mentioned subpoenaed witness was a government official from the Dominican Republic, whom could settle an issue to be argued at trial, on direct review, Movant's counsel argued how the Respondent "denied [Movant] a fair trial by failing to produce the only witness allegedly in a position to settle the identification issue", Matos-Luchi 627 F.3d at 8. The Circuit Court held the above mentioned appellate issue not to be "evident in this case", Id. .

Rather, the Circuit Court shifts the weight of deficient performance on the defendants, Id., as to the failure to produce the subpoenaed witness. The Circuit Court held how the "government attempted to secure his presence at trial. But the defendants incorrectly identified Matos Rodriguez as a member of the 'Dominican Coast Guard' when he was in fact with the Dominican equivalent of the Drug Enforcement Agency", Id. . Because Movant was

represented by counsel Morel when the subpoena was executed by the presiding Court, the burden of duty is on Movant's counsel, see Cronic 466 U.S. at 653. The Circuit Court having acknowledged that the foregoing identification error was "discovered" and the subpoenaed witness "located, there was insufficient time to get him the necessary documents to travel to the United States", Matos-Luchi, ante, Id. 8.

As to the above mentioned analysis, the First Circuit holds, conclusively, how "defendants never sought a continuance", Id. . This Circuit has held, in reference to the pleading for a continuance, how because there is "no mechanical test", each case must be evaluated on its own facts, see U.S. v. Saccoccia 58 F.3d 754,770 (1995). In U.S. v. Rodriguez-Duran 507 F.3d 749 (1st Cir. 2007) the Circuit Court held as to the above mentioned inquiry the relevant factors to be considered before granting a motion for continuance. The Rodriguez-Duran, supra, Court held factors to be considered include "reasons contemporaneously presented in support of the request, the amount of time needed for effective preparation, the complexity of the case, the extent of inconvenience to others if a continuance is granted, and the likelihood of injustice or unfair prejudice attributable to the denial of a continuance", Id. 763.

In the case before this Court, counsel Morel ineffectively failed to request a continuance, based on an error which may be reasonably attributed to the defense. As the Strickland Court 466 U.S. 668 has held that a competent attorney should conduct a reasonable investigation of the facts and law available, for a

fair proceeding. The presiding Court should consider evaluating the challenged conduct of counsel Morel's failure to plead for a continuance, the minute or point in time "the error was discovered and Matos Rodriguez located", Matos-Luchi 627 F.3d at 8.

As is, unlike the case in Lee v. Kemna 534 U.S. 362 (2002), witness Carmelo Matos Rodriguez was a subpoenaed witness that was "located" but "there was insufficient time to get him the necessary documents to travel to the United States", Matos-Luchi, supra. In an effort to secure a fair adversarial proceeding, counsel Morel, in exercising his duty as a reasonably competent attorney, should have pleaded for a continuance based on witness Matos Rodriguez's availability but then present traveling complications, for timely adhering to the judicial proceeding.

In viewing counsel Morel's demeanor for not pursuing a continuance, counsel Morel's negligent act deprived the Court, at trial, of relevant information concerning the interrogation effected by Dominican Republic's National Direction for Drug Control's personnel aboard the Dominican cutter with the "yola" crew, [Doc. No. 143, p. 10]. As witness Matos Rodriguez is a member of the National Direction for Drug Control, one of the fishermen from the questioned "yola", Manolo Soto Perez, testified at trial, how upon being found by the Dominican cutter, it was the subpoenaed witness whom received the "yola" crew in the above mentioned cutter, [Doc. No. 143, p. 83-84]. Not only did Matos Rodriguez "greet" the "yola" crew, but, according to Manolo Soto Perez (Perez), the subpoenaed witness was familiarly acquainted with Perez, [supra].

Based on the above mentioned information available through

the established record, in conjunction with Movant submitting how witness Matos Rodriguez's testimony would have shed light on the fact that Movant and the other "yola" crew members are known fisherman throughout the water area where the offense conduct took place; The Movant pleads to this Court, aside for the fact that its executed order for a subpoena was not complied with even though Matos Rodriguez was "located", to consider the importance of the unknown context of the Dominican Drug Control's interrogation with the "yola" crew and the background information subpoenaed witness Matos Rodriguez would have provided on behalf of the defense. In considering the factors this Court would have taken into account under Rodriguez-Duran, ante, Id. 763, had counsel Morel moved the presiding Court for a continuance in order to produce the above mentioned subpoenaed witness, there is a reasonable probability that the weight of the evidence provided by the Government, would have diminished in value, for a verdict of guilty beyond a reasonable doubt, thus, subjecting the instant case to a fair and just adversarial process; had Matos Rodriguez been effectively brought before this Court to provide the subpoenaed testimony.

- 3] Whether Movant's Counsel was Ineffective for not Pleading for a Substantive Downward Departure to the Court when the Sentencing Record Demonstrates Merit?

The Movant, respectfully, submits in support of the presented above mentioned Ground, how the First Circuit in addressing the appellate issue on whether the presiding Court "failed to understand his discretion to depart downwards under Booker", Matos-Luchi 627 F.3d at 9; held there to be no indication

that this Court misunderstood its authority pursuant to U.S. v. Booker 543 U.S. 220 (2005)³, Matos-Luchi, ante, Id. . The Circuit Court in finding basis for the foregoing holding cites this Court's statement on how "'[t]here is nothing before the Court that would allow [it] to make any meaningful exercise of any additional sentencing factor under [18 U.S.C. §] 3553(a), because nothing of the sort has been argued'", Id., [Doc. No. 165, p. 9].

As noted above, the presiding Court does not consider any substantive argument, since "nothing of the sort has been argued", supra. In Glover v. U.S. 531 U.S. 198 (2001) the U.S. Supreme Court held how an erroneous sentencing determination which unlawfully increases a prison sentence, establishes prejudice, for an ineffective assistance of counsel claim, see also unpublished opinion, citing Glover, supra, Miranda-Severino, 2009 U.S. Dist. LEXIS 55468, (D.P.R. June 20, 2009).

In viewing the established record, the First Circuit has held the manner in which Supreme Court precedents are to be applied to Booker's, supra, holding in order to provide for a reasonable sentence, see U.S. v. Rodriguez 527 F.3d 221,224 (2008); see also Title 18 U.S.C. §3742(e).

3] In U.S. v. Booker 543 U.S. 220 (2005) the U.S. Supreme Court held the United States Sentencing Guidelines' (USSG) mandatory nature to be unconstitutional. As a remedy to the above mentioned holding, the Supreme Court preserved the USSG applications only to be advisory. Thus, being the USSG is now only to be considered in determining a sentence, by a judge. The standard of review is reasonableness, see 18 U.S.C. §3742(e). In measuring the reasonableness of an imposed sentence under a Booker regime, a reviewing court looks first at the procedural reasonableness, see Rita v. U.S. 551 U.S. 338 (2007), then the substantive reasonableness, see Gall v. U.S. 552 U.S. 38 (2007). Nevertheless, should the Sentencing Court reasonably disregard the USSG's applications it may do so in imposing its sentence, see Kimbrough v. U.S. 552 U.S. 85 (2007).

During the Sentencing Hearing, the Guidelines level Movant and the other offenders were exposed to was level 38 (235-293 months), [Doc. No. 165, p. 3-5]. The above mentioned recommendation was based on the drug quantity involved in the offense conduct, [Doc. No. 165, p. 4]. However, the Court in exercising its discretion held how "235 months is a lot of time", [Doc. No. 165, p. 8].

The above mentioned holding by the presiding Court is based on the fact that because of the offenders' acts and the testimony provided by Manolo Soto-Perez and Ramon Carrasco-Carrasco, the Government asked for a sentence "in the mid range" of the above mentioned guidelines level, [Doc. No. 165, supra]. Inclusively, this Court holds, as a supportive factor, to not increase the sentence to more than 235 months, how "by the time these guys serve their sentence, perhaps you and I will be retired", [Doc. No. 165, p. 8-9], see Title 18 U.S.C. §3553(a)(2)(C). Based on this Court's above mentioned analysis the likelihood of recidivism is countered by a 235 month sentence. Taking into consideration the previously expressed, the Movant suggests that the possible maximum sentence was "capped" at 235 months, based on the presiding Court's discretion. However, being the low-end of the available procedural calculation in guideline level 38 is 235 months, the Court, having not heard any argument whatsoever to warrant a substantive sentence, considering the factors announced in Title 18 U.S.C. §3553(a), sentenced Movant to 235 months, [Doc. No. 165, p. 9-10].

As it pertains to the above mentioned offenders whom testified at trial, the presiding Court determined that "they lied", while

on the witness stand, [Doc. No. 165, p. 6-7 & 9]. This Court determined that both Manolo Soto-Perez (Perez) and Ramon Carrasco-Carrasco (Carrasco) "lied when they testified about their purposes on board" the "yola" boat, [Doc. No. 165, p. 9]. In the foregoing analysis by this Court, this Court also notes how the Pre-Sentence Investigative Report (PSR) does not recommend any available adjustments, for having testified at the trial, [supra]. Having considered the aforementioned information on the record, this Court decides to leave the procedural calculation "the way it is", and not apply an upward adjustment to Perez and Carrasco for having testified at trial, [supra], thus, sentencing all the offenders to 235 months.

Movant, relying on the sentencing record, [Doc. No. 165], to challenge counsel Morel's performance during the Sentencing Hearing and to establish prejudice, respectfully, submits that had counsel Morel been a competent attorney and conducted a reasonable investigation of the law available, counsel Morel, based on the foregoing determinations by the presiding Court, could have pleaded to the Court for a substantive sentence, pursuant to Title 18 U.S.C. §3553(a).

As is, even though Perez and Carrasco falsely testified at trial, the above mentioned offenders were sentenced to the same prison term Movant received. The mentioned disparity between the offenders has prejudiced the Movant, pursuant to Title 18 U.S.C. §3553(a)(6). For starters, under a procedural calculation, based on this Court's findings, the testifying offenders would be considered for an obstruction of justice upward adjustment, pursuant

to §3C1.1 in the United States Sentencing Guidelines (USSG). The previously mentioned USSG adjustment calls for a two-level increase to the established guideline level, based on the offense conduct. Had the Court considered adjusting the obstruction of justice enhancement for falsely testifying at trial, Perez and Carrasco would be exposed to an advisory guideline level of 40 (292-365 months). But because, as the record reflects, this Court held 235 months to be "a lot of time", [Doc. No. 165, p. 8], this Court decided to leave the procedural calculation the way it was recommended, [Doc. No. 165, p. 9].

In Gall pursuant to Gall v. U.S. 552 U.S. 38 (2007), the Gall Court, ante, held how in considering a substantive sentence, a Sentencing Court should consider the totality of the circumstances. See U.S. v. Rodriguez 527 F.3d at 224. In considering the totality of the circumstances, Movant, respectfully, submits that had counsel Morel pleaded to the Court for a deviation of the 235 month sentence, based on the disparity between Movant and the other offenders whom testified, there is a reasonable probability that the outcome of the sentence would have been different, but because, as this Court held, "nothing of the sort has been argued", [Doc. No. 165, p. 9], Movant is prejudiced.

Viewing the aforementioned argument, counsel Morel, upon submitting a consideration of the disparity between Movant and the other two offenders, pursuant to Title 18 U.S.C. §3553(a)(6), could have suggested to the Court that based on the fact that a two-level increase, pursuant to §3C1.1, was not considered in both Perez and Carrasco's sentence, even though this Court held

they falsely testified, [Doc. No. 165, p. 6-7 & 9], at trial; This Court could have tailored Movant's 235 month sentence, since he did not testify or falsely testify at trial. In pleading for a deviation from the 235 month term of imprisonment, counsel Morel could have suggested, based on the record, that a two-level decrease from level 38 would serve Title 18 U.S.C. §3553(a)(6)'s purpose. As guideline level 36 (188-235 months) sets 235 months at the top of the guideline range, and this Court held 235 months to be a lot of time, counsel Morel could have pleaded for a 188 month sentence, for Movant not having falsely testified or testified at trial. Counsel Morel would have prevailed in seeking a reasonable and just sentence with the above mentioned quantified variance analysis suggested by the Movant, based on the established record.

4] Whether Movant's Appellate Counsel was
Ineffective for not having Pursued Further
Review of the Statutory Interpretation Issue?

Movant, in light of the First Circuit's holding in this case's published opinion, U.S. v. Matos-Luchi 627 F.3d 1 (2010), submits the argument in support to the above mentioned presented ground, in the §2255 pleading, for an ineffective assistance of counsel claim during appellate review.

It has been held, as to the above mentioned claim, that "tactical choices regarding issues on appeal are properly left to the sound judgment of counsel", Jones v. Barnes 463 U.S. 745,751 (1983). In tune with the foregoing, counsel Morel is "not required to raise every non-frivolous issue", but counsel Morel should select among them to maximize the likelihood of success on

merits, see Lattimore v. Dubois 311 F.3d 46 at 57 (1st Cir. 2002). As counsel Morel's pursuit of success should be "objectively reasonable", on direct review, see Smith v. Robbins 528 U.S. 259 at 285 (2000), the Movant submits that counsel Morel should have pursued further appellate review of the First Circuit's panel decision in Matos-Luchi, ante.

In particular to the above mentioned argument for an ineffective claim, the Circuit Court, in issuing its holding, as to the statutory language interpretation of the charging offense, see Title 46 U.S.C. §70502(d)(1)(B)(Defining vessel without nationality, as announced in Title 46 U.S.C. §70502(c)(1)(A), for jurisdiction purposes, to comply with the charging offense, see Title 46 U.S.C. §70503(a)(1).); The Circuit Court held how being the "questioning was **aboard** the Dominican cutter rather than the [Movant's] yola" (emphasis added) arguably the statutory language of the mentioned Title 46 U.S.C. §70502(d)(1)(B) would not fit with the above mentioned questioning, see Matos-Luchi, Id. 6. The First Circuit's basis for previously holding so, is reliant on the understanding that should the word "aboard" in 46 U.S.C. §70502(d)(1)(B)'s construction be "given its common meaning of 'on board'", then the above mentioned analysis would stand (emphasis added), Id. .

Based on the above mentioned holding, the Circuit Court reconciles its expressed understanding by expressing how the word "aboard", in nautical contexts, also means "'alongside of'", thus, accordingly, the Circuit Court held Movant was arguably "alongside of the yola", when being questioned, see Matos-Luchi, Id. 6, footnote 7.

The Movant, relying on the available record, submits counsel

Morel could have, based on the ambiguity of the previously mentioned word, pursued further review for an en banc determination, pursuant to Rule 35 in the Fed. R. of Appellate P. or a writ of certiorari in the U.S. Supreme Court.

Movant, in furtherance, respectfully submits, as to the foregoing argument, how it has been held, for purposes of legislative intent, when construing a statute, courts are to look to its terms to determine its meaning, see U.S. v. Alvarez-Machain 504 U.S. 655 at 665 (1992); see also U.S. v. Restrepo 676 F. Supp. 372 (D.Mass. 1987).

Had counsel Morel conducted a reasonable investigation of the facts and law, counsel Morel, in assessing the First Circuit's holding how "aboard", in 46 U.S.C. §70502(d)(1)(B) means "'alongside of'", in order to hold how Movant was alongside of the vessel when being interrogated by the U.S. authorities; Counsel Morel, upon viewing the related statutes in Title 46 (Maritime Drug Law Enforcement) could have reasonably argued that "aboard", within 46 U.S.C. §705029(d)(1)(B) statutory construction means "on board a passenger vehicle, as a ship, train, or aircraft", Webster's II, New Riverside University Dictionary, by Houghton Mifflin Company, (1984)⁴.

4] It is noteworthy to mention that the versions cited by the First Circuit to define the word "aboard" are publications issued after the enactment of the Maritime Drug Enforcement Act (1986), Matos-Luchi 627 F.3d at 6, footnote 7. Whereas, the version cited by Movant was published before the enactment of the above mentioned relevant Act. See also Circuit Justice Lipez's dissent in Matos-Luchi, supra, for a generalized description of the said Act's history.

Since the First Circuit panel concedes there are two meanings to the word "aboard", Matos-Luchi, 627 F.3d at 6. The previously mentioned holding raises an issue of ambiguity pursuant to the rule of lenity, see U.S. v. Bass 404 U.S. 336 (1971); see also U.S. v. Ribas Dominicci 899 F. Supp. 42,46 (D.P.R. 1995). Counsel Morel could have pursued the above mentioned application of law, on the following suggested reasonable analysis.

Movant, respectfully submits that in Bass, supra, the U.S. Supreme Court held how "the rule of lenity is based on two points, first, 'a fair warning should be given to the world in language that the **common** world will understand, of what the law intends to do if a certain line is passed', second, 'legislators and not courts should define criminal activity'", Id. 348. In line with the mentioned rule, the Bass Court held how when there is an ambiguity in a criminal statute, doubts are resolved in favor of the Movant, Id. .

Had counsel Morel viewed Title 46 in its entirety, as Movant was charged with Title 46 U.S.C. §§70502(c)(1)(A), 70503(a)(1), 70504(b)(1), & 70506(b), [Doc. No. 14], counsel Morel would have noted, as Movant suggests, that the Circuit Panel's holding as to the definition of the word "aboard" does not harmonize with Title 46's legislative intent.

For example, in Title 46 U.S.C. §70501, Findings and declarations, in relevant part, the statute reads "Congress finds and declares that (1) trafficking in controlled substances **aboard** vessels is a serious international problem". Likewise, in harmony with the above mentioned finding and declaration, 46 U.S.C. §70503(a)(1),

in relevant part, reads how "an individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance **on board** a vessel". (emphasis added).

Should the Circuit Court's holding be applied, similarly, to 46 U.S.C §70501, then in relevant part, the statute would be concerned with the "trafficking in controlled substances [alongside of] vessels", thus, defeating 46 U.S.C. §70503(a)(1)'s purpose or at least conflicting with its language.

In Matos-Luchi 627 F.3d 1, the Circuit Court supports its holding, as to the correct definition to be applied for the word "aboard", by expressing how "to read the MDLEA more restrictively would mean that the master and crew need only carry no papers and jump overboard to avoid having their vessel classed as stateless", Matos-Luchi, supra, at 6-7. Counsel Morel could have easily contested the foregoing holding by arguing how, in the instant case, U.S. Coast Guard officer Richard K. Young (Young), testified how after the drug bales were jettisoned by the "yola" crew, the investigating authorities would "rather receive the cargo, as opposed to allow it to drift away and lose position of it", [Doc. No. 140; p. 74]. Officer Young even details the manner in which the drug cargo would be "rescued", [supra]. Based on the aforementioned record and the Circuit Court's above mentioned holding, counsel Morel could have compared the "value" of a human life to that of a drug cargo. Thus, should a master and crew "jump ship", the authorities could just as well place them back on their vessel, using the same techniques applied to

"rescue" a drug cargo on high seas. As Circuit Justice Lipez held in the dissenting opinion, as to the use of the word "aboard" in the Maritime Drug Law Enforcement Act (MDLEA), "Congress had the ordinary usage of the word in mind", Matos-Luchi, 627 F.3d at 20, footnote 26.

Aside for the previously mentioned argument, the Circuit Court nevertheless, supports its position by holding how "neither 'aboard' the yola, nor adjacent to it on the cutter, did any crew member make an affirmative claim of nationality for the vessel, nor did the yola fly a flag or carry registry papers issued by any state", Matos-Luchi, supra, Id. 6. Counsel Morel, based on the trial record, [Doc. No. 140-49], could have presented the vital fact that the U.S. authorities abandoned its pursuit of the "yola" in order to retrieve the drug cargo, [Doc. No. 140, p. 74]. As of consequence, a Dominican patrol boat went to "assist" in the detention of the suspected "yola" crew, [supra]. It was the Dominican patrol boat that formally encountered the "yola" crew, [Doc. No. 140, p. 75-76] & [Doc. No. 143, p. 7-8]. Not only did the Dominican patrol cutter encounter the "yola" crew, they also seized the "yola" and transferred its crew aboard the mentioned cutter, [Doc. No. 143, p. 9].

It was several hours later that the U.S. authorities visit the Dominican cutter, where two fishing groups are seized, [Doc. No. 140, p. 77 & 79]. According to the Dominican authorities, the coordinates supplied by the U.S. authorities, initially, caused the seizure of the first fishing group, [Doc. No. 143, p. 4-6], then afterwards other coordinates were given to the

Dominican cutter by U.S. authorities, [Doc. No. 143, p. 7-8].

It was the second provided coordinates that located the "yola" crew. Had Counsel pursued an argument as to the statutory interpretation, counsel Morel could have submitted for further review how U.S. authorities, at high seas, should be aware of the procedures to be followed, under U.S. law, for the enforcement of drug trafficking. As the U.S. authorities asked the Dominican authorities to "assist" them in the capture of the "rogue" boat, [Doc. No. 140, p. 74], the U.S. authorities, could have also petitioned the Dominican cutter to seize the "yola" and tie it to its stern, as the Dominican authorities ultimately did, with the "yola's" crew aboard, until the U.S. authorities arrived, for investigation purposes. The previously mentioned rationale complies with 46 U.S.C §(d)(1)(B)'s language, but because the U.S. authorities failed to inform the Dominican authorities to apply the above mentioned procedure, the Dominican authorities transferred the "yola's" crew to its cutter, [Doc. No. 143, p. 9-10]. Aside for the fact that Movant's "yola" was ~~adrift~~ since it "didn't have any gas", [supra, p. 8], upon the "yola" being secured, [supra, 10] to the cutter, there is no evidence to suggest that the above mentioned "yola" was sinking, that a crew member was experiencing medical difficulties, or that the weather condition (i.e hurricane, storm, etc.) merited, under exceptional circumstances to transfer Movant and the other crew members to the Dominican cutter.

As Circuit Justice Lipez held in the dissenting opinion, Movant submits that "the majority correctly holds, Congress did

"intend" for the examples announced in 46 U.S.C. §70502(d)(1)(B) "to be exhaustive", Matos-Luchi, 627 F.3d at 15. Clearly the previously mentioned holding can be regarded to affect vessels under exceptional circumstances. In this case, it was the U.S. authorities whom 1) abandoned the pursuit of the suspected "yola", in order to retrieve the jettisoned drug cargo and 2) failed to properly instruct the assisting Dominican authroties, in compliance with 46 U.S.C. §70502(d)(1)(B)'s language, to simply secure the "yola" to its cutter and leave its crew in the mentioned fishing boat, while the U.S. authorities arrive for investigation and jurisdiction purposes. In conjunction with the instant argument, counsel Morel could have, also, entertained submitting the open question on how the Dominican authorities' "informal consent" is enough to transfer Dominican nationals from a Dominican cutter to U.S. authorities, for prosecution purposes, see Matos-Luchi, supra, at 7.

As to the informal consent issue, the Circuit Court held it to be an "open question", Id. 7. In seeking relief, counsel Morel could have submitted said issue for further review. Though factual that consent is a well established basis of jurisdiction to prescribe under international law, see U.S. v. Robinson 843 F.2d 1,4 (1st Cir. 1988). Said consent may be proved through "certification of the Secretary of State or the Secretary's desinee", 46 U.S.C. §70502(d)(2); see also U.S. v. Angulo-Hernandez 565 F.3d 2 (1st Cir. 2009); U.S. v. Normandin 378 F. Supp.2d 4 (D.P.R. 2005). However, said requirement is available when "the master or individual

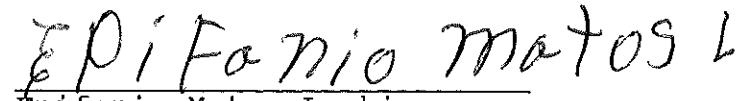
in charge" of the vessel in question makes a claim of registry or nationality, 46 U.S.C. §70502(d). In the instant case, according to the trial record, the "yola" crew was interrogated, upon boarding the Dominican cutter, by Dominican authorities, [Doc. No. 143, p. 10]. Whether Movant and the other crew members of the seized "yola" made a claim of nationality or registry to the Dominican authorities is still unknown, since the subpoenaed witness was never brought before the Court. However, according to Perez ("yola" crew member) the "yola" was registered in the Dominican Republic, [Doc. No. 143, p. 73]. What is known is that the "yola" crew members claimed being Dominican nationals, see Matos-Luchi 627 F.3d at 2. Because, technically, the "yola" crew was under Dominican jurisdiction when boarding the cutter, counsel Morel could have submitted that the question to determine whether the "yola" was a vessel of Dominican nationality or registry, should have been verified by the Dominican authorities to the U.S. authorities, especially, since the Dominican authorities have the "'primary right'" to prosecute individuals on board a Dominican vessel, see Matos-Luchi, *supra*, at 19, footnote 23 (dissenting opinion). Contrary to the previously mentioned, U.S. authorities were permitted to visit the Dominican cutter and interrogate the "yola" crew members. Counsel Morel could have further argued that U.S. authorities bypassed their authority, by not consulting the Dominican authorities' on the "yola's" nationality or registry based on Dominican law and the performed interrogation.

Had counsel Morel pursued further appellate review based on

the aforementioned presented argument, because of the ambiguity that lies with the word "aboard" in the MDLEA's statutes and the irregularities performed by the U.S. authorities to secure the Movant's vessel's jurisdiction, the foregoing appellate holdings should have been submitted for an en banc determination to the First Circuit or for the issuance of a writ of certiorari to the U.S. Supreme Court. Particularly since it would be a procedural right that any competent attorney, based on the Circuit's holdings, would have exercised.

CONCLUSION

WHEREFORE, based on the foregoing Memorandum support of law to the presented Grounds in Movant's §2255 pleading, the Movant respectfully asks the presiding Honorable Court, in considering the established record and the Circuit's holdings, to grant the relief it deems just for the presented ineffective assistance of counsel claims.


Epifanio Matos Luchi,
Epifanio Matos-Luchi,
propia persona.

OATH

I, Epifanio Matos-Luchi, do hereby attest under the penalty of Perjury that the foregoing Memorandum of Law In Support of §2255 Motion to Vacate, Set Aside, or Correct Conviction/Sentence is true and correct, to the best of my knowledge and capabilities. Likewise, I am a Layman in American Jurisprudence whom has been assisted in the drafting of the said pleading, being I do not understand or command the English language.

Date: 11-30-11

Epifanio Matos L
Epifanio Matos-Luchi,
Reg. No. 31216-069

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, a true and correct §2255 Motion along with the above mentioned Memorandum of Law In Support of §2255 Motion to Vacate, Set Aside, or Correct Conviction/Sentence has been given to a Bureau of Prisons official on this 30 day of November, 2011 for forwarding to the following addresses:

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Respectfully submitted,

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